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No. 52

In the

# Supreme Court of the United States

OCTOBER TERM, 1967

S. EDWARD BLOOM, *Petitioner,*

*vs.*

STATE OF ILLINOIS, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Illinois.

## REPLY BRIEF FOR S. EDWARD BLOOM, PETITIONER

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## REPLY BRIEF FOR S. EDWARD BLOOM, PETITIONER

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### I.

### RESPONDENTS HAVE ATTEMPTED TO INJECT INTO THIS CAUSE IRRELEVANT AND IMMATERIAL MATTERS NOT BEARING ON THE CONSTITUTIONAL ISSUE HERE INVOLVED RELATING TO TRIAL BY JURY.

Respondent's brief is a misguided effort artfully intended to distract this Court from the constitutional issues squarely presented by petitioner. In an obvious

belief in the hoary legal cliché that bad cases make bad law, respondent devotes a third of its brief to an exposition of facts supposedly probative of petitioner's guilt as if this cause were to be determined on the merits.[1]

In this connection, it taunts petitioner for not challenging on appeal the "*quantum* of evidence which resulted in the adjudication of contempt" and urges such failure as indicating that even a jury necessarily would have reached the same result as the trial court. (Resp's Bf., p. 15).[2]

Petitioner is confident that this overt effort to brainwash this Court will be abortive, not only because of the brashness of the attempt but also because the theory upon

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[1] Respondent, however, in its statement of facts neglects to disclose petitioner's psychiatric defense in which a competent psychiatrist testified that in his opinion petitioner's mental state on pertinent dates was such that he had neither an intent to defraud or to embarrass the court or to impede its administration of justice. (R. 111, 112) As pointed out in petitioner's brief, p. 8, such an intent is a necessary element of criminal contempt in Illinois. In addition, Mr. Edward Arkema, referred to in respondent's statement, p. 4, as an attorney for heirs challenging the Will prepared by petitioner and therefore adversary to him, stated at the trial that he had come to the conclusion that petitioner had no awareness of the legal significance of the acts he was carrying on. (R. 98). No one disputes that there was thus a fact question here involved.

[2] Petitioner did not challenge the sufficiency of the evidence in the Illinois Supreme Court in view of the rule prevailing in that State that a verdict will not be disturbed on appeal when there is any evidence which, when taken with its intendments most favorable to an appellee, tends to prove the essential allegations of the complaint. *Fosdick* v. *Servis*, 40 Ill. App. 2d 363 (1963); *Blue* v. *St. Clair Country Club*, 7 Ill. App. 2d 359 (1956). The record here discloses such evidence.

which respondent's peculiar tactics are based is not even good legal nonsense. The supposition that a claimed constitutional right to a jury trial is to be determined by weighing the *quantum* of evidence or by conjecturing whether a hypothetical jury would have reached the same verdict as the trial judge has never received the support of any federal or state court. Obviously, such matters are entirely immaterial. Important constitutional deprivations are determined by reference to the Constitution of the United States and not by guessing whether or not the same result would have ensued had there been no denial of the rights asserted.

## II.

## RESPONDENT FAILS TO RECOGNIZE THE CONSTITUTIONAL IMPACT OF CHEFF v. SCHNACKENBERG, 384 U.S. 373 ON FEDERAL COURTS INSOFAR AS CRIMINAL CONTEMPT CASES INVOLVING SENTENCES OF MORE THAN SIX MONTHS ARE CONCERNED.

Respondent never does come to grips with the basic proposition asserted by petitioner that the denial of a trial by jury in a criminal contempt case is constitutionally prohibited when the alleged contemptuous conduct also amounts to a felony and is indictable as such. (Petr's Bf. pp. 13, 15-17).[3] Instead, respondent relies on *Green* v.

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[3] Respondent complains that it can no longer indict petitioner since such prosecution is now barred by an Illinois Statute of Limitations (Resp's Bf. p. 14). This is hardly a justification for denying petitioner's claims here. In any event, should those claims be deemed valid by this court, respondent would not thereby be deprived of further proceeding against petitioner since upon remandment under such circumstances, a jury trial of the alleged contempt would still be available.

*United States*, 356 U.S. 165 and *United States* v. *Barnett*, 376 U. S. 681, neither of which involved conduct amounting to a felony. The failure of respondent to face up to this distinguishing feature and its misreliance on *Green* and *Barnett* is emphasized by its quotation from *Barnett* indicating that those cases are limited to conduct ranging from misbehavior in court to disobedience of court orders (Resp's Bf. p. 12). It is clear that these cases do not reach felonious conduct. In this connection, petitioner has pointed out that none of the long line of cases relied on by Mr. Justice Harlan in *Cheff* v. *Schnackenberg*, 384 U.S. 373, 382, as authority for the proposition that jury trials are not constitutionally required in criminal contempt cases involved conduct similar to that in the case at bar. (Petr's Bf., footnote 8, p. 15). This argument has not drawn any response at all.

Respondent, however, does apparently recognize that *Cheff* presents most serious obstacles to its position. Accordingly it attempts to minimize the impact of this Court's decision by urging that contempts involving sentences of more than six months (as in the instant case) were dealt with under the supervisory powers of this Court rather than constitutionally (Resp's Bf. p. 13). Respondent therefore contends that this Court has imposed no constitutional requirements on federal courts in this respect and therefore cannot impose them *via* the Fourteenth Amendment on state courts. (Resp's Bf. p. 14). In making this argument, respondent ignores petitioner's analysis of this Court's reasoning in *Cheff* but furnishes none of its own which could support its contentions. It seems clear that it could not have done so because this Court in holding that trials by jury are not constitutionally required in criminal contempts involving sentences of six months or less clearly implied that such

trials are constitutionally required where heavier sentences are involved.

Furthermore, the exercise of supervisory power as to pending and future cases in no way detracts from the constitutional issues involved in this case. This Court did not consider the questions raised in *Cheff* as regulatory nor rule making. The approach to the *Cheff* case was definitely on constitutional terms. This Court explicitly stated that it granted Cheff's Petition for Certiorari "limited to a review of the question whether, after a denial of a demand for a jury, a sentence of imprisonment of six months is constitutionally permissible under Article 3 and the Sixth Amendment." To assume the reasoning of the court below, we would have to conclude that this Court, recognizing only a constitutional question, did not resolve it on a constitutional basis.

While this Court resolved the issue in *Cheff* by denominating his six month sentence as satisfactorily suiting the outmost limits of petty offenses, it also, as above stated, clearly implied and agreed that sentences imposed in excess of six months were constitutionally required to provide for jury trial. In summarizing Cheff's argument, the court said that he, Cheff, "would have us hold that the right to trial by jury attaches in all criminal contempts and not merely those which are outside the category of 'petty offenses'." p. 379.

Thus, the main opinion in *Cheff* takes for granted that trial by jury is insured under the Constitution when the sentence exceeds the six month limitation.

The interpretation put on *Cheff* by respondent ignores the entire tenor of this Court's decision. *Cheff* revolves principally about the decision in *District of Columbia* v. *Clawans*, 300 U.S. 617, and clearly approached the ques-

tion of summary punishment as a constitutional one. Illustratively, the dissent of Justices Black and Douglas adverted to and interpreted *Clawans* as reflecting a principle that no offense which carries a substantial penalty can be "petty." In the main opinion, the Court accepted a statement from the dissent in *United States* v. *Barnett,* 376 U.S. 681 at 751 that:

> "At the time of the constitution all types of 'petty' offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts."

The decision in *Clawans,* so heavily relied on in *Cheff,* makes it clear that the summary imposition of sentences raises a constitutional question.

> "It is settled by the decisions of this Court, which need not now be discussed in detail, that the right of trial by jury, thus secured, does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction. We think, as the Court of Appeals held and respondent concedes, that apart from the prescribed penalty, the offense of which petitioner was convicted is, by its nature, of this class, and that were it not for the severity of the punishment, the offender could not, under our decisions, claim a trial by jury as of right.
>
> * * * *
>
> "But this Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory of-

> fense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution. See *Schick* v. *United States, supra* (195 U.S. 67, 68, 49 L. ed. 101, 102, 24 S. Ct. 826, 1 Ann. Cas. 585)." *District of Columbia* v. *Clawans,* 300 U.S. 617, 625-5.

It is submitted that this Court's decision in *Cheff* was clearly the resolution of a constitutional issue and that the incarceration of this petitioner for a period in excess of the outmost limits of those that can be imposed for petty offenses offends against the Sixth Amendment to the Constitution of the United States, made applicable to states under the Fourteenth Amendment.

## III.

## RESPONDENT'S CONTENTIONS AS TO THE RIGHTS OF A TRIAL JUDGE TO PRELIMINARY INVESTIGATE IN CAMERA WHETHER OR NOT A CONTEMPT HAS BEEN COMMITTED AGAINST HIM CONFLICTS WITH DECISIONS OF THIS COURT.

Respondent with some cynicism argues that the trial court's *in camera* receipt of its own investigator's report is "strategically necessary for proper use of the contempt power" (Resp's Bf. p. 17). In support of this, it is urged that such preliminary investigation enables the trial court to determine whether contempt charges can be "sufficiently or reasonably substantiated" (Resp's Bf. p. 17). Obviously, this view likens the trial judge to a grand jury which determines whether there is reasonable grounds for a belief that a crime has been committed.

Respondent fails to recognize that it was this precise practice which was condemned in *In re Murchison,* 349

U.S. 133 and *Re Oliver*, 333 U.S. 257. It also fails to note that once a trial judge has determined *in camera* that a contempt charge is "reasonably substantiated," it is extremely unlikely that he will reverse himself upon a hearing.

The Illinois Supreme Court did not decide this point on the grounds now urged here by respondent. It rested its decision as to this portion of the argument solely because (1) it found that it is proper to appoint an *amicus curiae* in contempt cases and (2) petitioner showed no prejudice arising out of the receipt by the trial judge of the secret report.

Petitioner has no quarrel with the court below as to the appointment of an *amicus curiae* to investigate or prosecute herein. His complaint relates solely to the misuse of the investigative report prepared by the *amicus curiae*. As to the second ground, it has heretofore been pointed out that it is impossible for petitioner to demonstrate the prejudice here involved since the trial court for reasons best known to it has refused to make the secret report a part of the record. This fact has drawn no comment from respondent.

Finally the record below despite respondent's contentions clearly supports petitioner's assertion that petitioner was permitted only limited use of the report and then only insofar as it related to witnesses who actually testified (R. 80, 81).

## IV.

## RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE CONSTITUTIONAL ERROR INHERENT IN THE PROSECUTOR'S COMMENT ON PETITIONER'S FAILURE TO TESTIFY WAS HARMLESS BEYOND REASONABLE DOUBT.

Respondent again misses the thrust of petitioner's argument that the comment by the prosecutor as to petitioner's failure to testify violates his constitutional rights. Petitioner, of course, recognizes the principle of *Chapman* v. *California,* 386 U.S. 18 but maintains that it is not here applicable because there has been no showing that the constitutional error complained of was harmless beyond reasonable doubt. Since the trial court did not state that it was disregarding the prosecutor's comment, it seems clear that he gave it weight particularly since the court stated that the failure of petitioner to testify in his own behalf was a matter of argument to which reply could be made.

## CONCLUSION

It is urged that respondent has failed to meet petitioner's arguments and that this cause be reversed and remanded.

Respectfully submitted,

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